Ketua Pengarah Hasil Dalam Negeri Malaysia v Mitraland Kota Damansara Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-359–06 OF 2021
VAZEER ALAM, MARIANA YAHYA AND AZIMAH OMAR JJCA
9 MAY 2023

Revenue Law — Income Tax — Special Commissioners ('SCIT') — Whether SCIT came to perverse verdict on taxpayer's appeal — Housing developer sought State Government's approval to lift Bumiputera reservation on several of its unsold properties so that they could be sold to any buyer — State Government granted approval subject to developer paying to Government certain percentage of each affected unit's price — Developer claimed tax relief on payments so made under s 33(1) of the Income Tax Act 1967 ('the ITA') — Inland Revenue Board ('IRB') disagreed and regarded payments as capital expenditure and imposed additional tax and penalty on developer — SCIT agreed with IRB and dismissed developer's appeal — Whether payments developer had made to State Government to remove obstacle standing in way of its generating income from sale of the properties was a revenue expense incurred solely and exclusively for production of income and was not capital in nature — Whether payments were therefore deductible under s 33(1) of the ITA

The Selangor State Government had a policy of reserving a certain number of residential and commercial units in any property development in the State for Bumputera buyers. Pursuant to two administrative circulars: (a) residential and commercial units reserved for Bumiputeras had to be priced at, respectively, 10% and 7% lower than the prices at which they were offered to other buyers; (b) if the Bumiputera-reserved units remained unsold after being advertised for at least three months, then the developer could apply to the State Government for approval to lift the reservation and offer them for sale to other buyers. If the State Government approved the lifting of the reservation, the monetary equivalent of the Bumiputera discount that attached to the properties in question had to be paid to the 'Lembaga Perumahan dan Hartanah Selangor ('LPHS') before registration of the transfer of the property could be made; and (c) if the developer had sold any Bumiputera-reserved property to non-Bumiputeras before the State Government had given its approval, the developer had to pay an additional 5% of the property's undiscounted price as penalty. In line with the aforesaid circulars, the respondent developer applied to LPHS for approval to sell the Bumiputera-reserved units in one of its projects to non-Bumiputeras. Even before the approval came, the respondent had already sold some of the reserved units. In total, the respondent paid to LPHS RM5,518,597 which was made up of RM4,468,090 (being the 10%

Bumiputera discount on the units sold) plus RM1,050,497 (being the 5% penalty for selling some of the units before LPHS had given its approval). The respondent claimed tax relief on the entire sum of RM5,518,597 under s 33(1) of the Income Tax Act 1967 ('the ITA') for the Year of Assessment 2014 on the ground that the said sum was an unavoidable expense wholly and exclusively incurred in the production of gross income. The appellant ('DGIR'), on the other hand, regarded the payment as capital expenditure and therefore non-deductible under s 33(1) of the ITA and served the respondent with a notice of additional assessment to pay further tax of RM1,379,649.25. The DGIR also imposed a penalty of RM344,912.31 under s 113(2) of the ITA on the ground that the respondent had submitted an incorrect tax return for Year of Assessment 2014. The Special Commissioners of Income Tax ('SCIT') dismissed the respondent's appeal and affirmed the DGIR's decision. The High Court set aside the SCIT's decision. The instant appeal was against the High Court's decision.

Held, allowing the appeal in part and ordering the DGIR's notice of additional assessment to the respondent for Year of Assessment 2014 to be amended to give effect to this decision:

(1) The High Court correctly held that the SCIT was wrong in finding that the entirety of the payments made by the respondent to LPHS was a penalty or pecuniary punishment and therefore not deductible under s 33(1) of the ITA (see paras 28–30).

(2) Whether the respondent sold the reserved units to Bumiputeras at the specified discount of 10% or 7% (as the case might be) or paid that same amount of discount over to the LPHS (if a unit was sold after LPHS had approved the lifting of the reservation), the income that the respondent made from the sale of a unit was the same either way. Contrary to the SCIT's findings, the respondent made no gain in terms of the net realised proceeds of sale (see para 31).

(3) The RM4,468,090 that the respondent had paid to LPHS constituted the total Bumiputera discount on the units that were sold. It was a revenue expense that was deductible under s 33(1) of the ITA because the purpose of that payment was solely to achieve sales and generate income for the respondent. If that sum was not paid, the former Bumiputera-reserved units could not be transferred or released to non-Bumiputera buyers. A payment made to remove an obstacle to profitable trading was attributable to revenue. The payment of the said sum was wholly and exclusively related to the production of income and was not capital in nature — they did not enrich or improve any item of fixed capital (see paras 34– 35, 37 & 39).

(4) On the other hand, the RM1,050,497 that the respondent had paid to LPHS by way of 5% penalty for selling Bumiputera-reserved units to

non-Bumiputeras before LPHS had given its approval to do so was not deductible under s 33(1) of the ITA as it was an avoidable payment and not an expense wholly and exclusively incurred in the production of income. The law was well established that a penalty imposed upon a taxpayer for infraction of the law was not a deductible expense as it was not incurred in the production of gross income. To that extent the DGIR's appeal was allowed and the decision of the High Court with respect to the RM1,050,497 was set aside and the DGIR could proceed to raise a notice of additional assessment against the respondent in respect of the said sum for the Year of Assessment 2014 (see paras 40–45).

(5) The High Court was correct in setting aside the penalty of RM344,912.31 imposed upon the respondent under s 113(2) of the ITA on the basis that ss 113(1) and (2) of the ITA would not apply in the present case as there was a genuine difference of opinion between the parties on the interpretation of the law. The respondent had taken a reasonable and considered legal position in submitting its returns and took the view that all payments to the LPHS were deductible under s 33(1) of the ITA. The facts showed that the respondent had acted in good faith and had made full disclosure (see paras 46–47).

[Bahasa Malaysia summary

Kerajaan Negeri Selangor mempunyai dasar untuk merizabkan beberapa jumlah unit kediaman dan komersial dalam mana-mana pembangunan hartanah di Negeri tersebut untuk pembeli Bumiputera. Menurut dua pekeliling pentadbiran: (a) unit kediaman dan komersil yang dikhaskan untuk Bumiputera perlu ditetapkan pada harga, masing-masing, 10% dan 7% lebih rendah daripada harga yang ditawarkan kepada pembeli lain; (b) jika unit rizab Bumiputera kekal tidak terjual selepas diiklankan sekurang-kurangnya tiga bulan, maka pemaju boleh memohon kepada Kerajaan Negeri untuk kelulusan bagi menarik balik rizab dan menawarkannya untuk dijual kepada pembeli lain. Sekiranya Kerajaan Negeri meluluskan penarikan rizab, nilai wang bersamaan diskaun Bumiputera yang dilampirkan pada hartanah berkenaan perlu dibayar kepada 'Lembaga Perumahan dan Hartanah Selangor ('LPHS') sebelum pendaftaran pindah milik hartanah tersebut boleh dibuat; dan (c) jika pemaju telah menjual mana-mana harta rizab Bumiputera kepada bukan Bumiputera sebelum Kerajaan Negeri memberi kelulusannya, pemaju perlu membayar tambahan 5% daripada harga tidak terdiskaun hartanah tersebut sebagai penalti. Selaras dengan pekeliling tersebut, pemaju responden memohon kepada LPHS untuk mendapatkan kelulusan untuk menjual unit rizab Bumiputera dalam salah satu projeknya kepada bukan Bumiputera. Malah sebelum kelulusan diberikan, responden telah pun menjual beberapa unit yang dirizab. Secara keseluruhan, responden membayar kepada LPHS RM5,518,597 yang terdiri daripada RM4,468,090 (iaitu diskaun 10% Bumiputera ke atas unit yang dijual) ditambah RM1,050,497 (iaitu penalti

5% kerana menjual beberapa unit sebelum LPHS memberikan kelulusannya). Responden menuntut pelepasan cukai ke atas jumlah keseluruhan RM5,518,597 di bawah s 33(1) Akta Cukai Pendapatan 1967 ('ACP') bagi Tahun Taksiran 2014 atas alasan bahawa jumlah tersebut merupakan perbelanjaan yang tidak dapat dielakkan sepenuhnya dan secara eksklusif ditanggung dalam pengeluaran pendapatan kasar. Perayu ('KPHDN'), sebaliknya, menganggap bayaran tersebut sebagai perbelanjaan modal dan oleh itu tidak boleh ditolak di bawah s 33(1) ACP dan menyampaikan kepada responden notis taksiran tambahan untuk membayar cukai selanjutnya sebanyak RM1,379,649.25. KPHDN juga mengenakan penalti sebanyak RM344,912.31 di bawah s 113(2) ACP atas alasan responden telah mengemukakan penyata cukai yang tidak tepat untuk Tahun Taksiran 2014. Pesuruhjaya Khas Cukai Pendapatan ('SCIT') menolak rayuan responden dan mengesahkan keputusan KPHDN. Mahkamah Tinggi mengetepikan keputusan SCIT. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan sebahagian rayuan dan memerintahkan notis KPHDN mengenai taksiran tambahan kepada responden bagi Tahun Taksiran 2014 dipinda bagi melaksanakan keputusan ini:

(1) Mahkamah Tinggi telah dengan tepat memutuskan bahawa SCIT adalah salah apabila dalam dapatan bahawa keseluruhan pembayaran yang dibuat oleh responden kepada LPHS adalah penalti atau hukuman kewangan dan oleh itu tidak boleh ditolak di bawah s 33(1) ACP (lihat perenggan 28–30).

(2) Sama ada responden menjual unit rizab kepada Bumiputera pada diskaun yang ditetapkan sebanyak 10% atau 7% (mengikut keadaan) atau membayar jumlah diskaun yang sama kepada LPHS (jika unit telah dijual selepas LPHS meluluskan penarikan rizab), pendapatan yang responden peroleh daripada penjualan unit adalah sama. Bertentangan dengan dapatan SCIT, responden tidak mendapat keuntungan dari segi hasil jualan bersih terealisasi (lihat perenggan 31).

(3) RM4,468,090 yang responden telah bayar kepada LPHS merupakan jumlah diskaun Bumiputera ke atas unit yang dijual. Ia merupakan perbelanjaan hasil yang boleh ditolak di bawah s 33(1) ACP kerana tujuan pembayaran tersebut adalah semata-mata untuk mencapai jualan dan menjana pendapatan untuk responden. Jika jumlah tersebut tidak dibayar, unit rizab Bumiputera sebelumnya tidak boleh dipindahmilik atau dilepaskan kepada pembeli bukan Bumiputera. Pembayaran yang dibuat untuk menghapuskan halangan kepada perdagangan yang menguntungkan adalah disebabkan oleh hasil. Pembayaran jumlah tersebut adalah sepenuhnya dan secara eksklusif berkaitan dengan pengeluaran pendapatan dan bukan bersifat modal — ia tidak

memperkaya atau menambah baik mana-mana butiran modal tetap (lihat perenggan 34–35, 37 & 39).

(4) Sebaliknya, RM1,050,497 yang responden telah bayar kepada LPHS berdasarkan penalti 5% kerana menjual unit simpanan Bumiputera kepada bukan Bumiputera sebelum LPHS memberi kelulusan untuk berbuat demikian tidak boleh ditolak di bawah s 33 (1) ACP kerana ia merupakan pembayaran yang boleh dielakkan dan bukan perbelanjaan yang ditanggung sepenuhnya dan secara eksklusif dalam pengeluaran pendapatan. Undang-undang adalah mantap bahawa penalti yang dikenakan ke atas pembayar cukai kerana melanggar undang-undang bukanlah perbelanjaan yang boleh ditolak kerana ia tidak ditanggung dalam pengeluaran pendapatan kasar. Setakatmana rayuan KPHDN dibenarkan dan keputusan Mahkamah Tinggi berkenaan dengan RM1,050,497 telah diketepikan dan KPHDN boleh meneruskan untuk mengemukakan notis taksiran tambahan terhadap responden berkenaan dengan jumlah tersebut bagi Tahun Taksiran 2014 (lihat perenggan 40–45).

(5) Mahkamah Tinggi telah tepat dalam mengetepikan penalti sebanyak RM344,912.31 yang dikenakan ke atas responden di bawah s 113(2) ACP atas asas bahawa ss 113(1) dan (2) ACP tidak akan terpakai dalam kes semasa kerana terdapat perbezaan pendapat yang tulen antara pihak-pihak mengenai tafsiran undang-undang. Responden telah mengambil pendirian yang munasabah dan mempertimbangkan kedudukan undang-undang dalam mengemukakan penyatanya dan berpandangan bahawa semua bayaran kepada LPHS boleh ditolak di bawah s 33(1) ACP. Fakta menunjukkan bahawa responden telah bertindak dengan suci hati dan telah membuat pendedahan penuh (lihat perenggan 46–47).]

Cases referred to

Ampat Tin Dredging Ltd v Director General of Inland Revenue [1982] 2 MLJ 46 (refd)

CIR v EC Warnes & Co Ltd [1919] 12 TC 227, KBD (refd)

Director General of Inland Revenue v Kulim Rubber Plantations Ltd [1981] 1 MLJ 214, FC (refd)

Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248; [1984] 1 CLJ Rep 108, FC (refd)

I Investment Ltd v Comptroller-General of Inland Revenue [1975] 2 MLJ 208, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Prima Nova Development Sdn Bhd (Civil Appeal No W-01(A)-318–07 of 2020) (unreported) (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 BLJ 265, SC (refd)

Nyf Realty Sdn Bhd v Comptroller of Inland Revenue [1974] 1 MLJ 182; [1985]

1 MTC 234; [1974] 1 LNS 100, HC (refd)
Taman Equine (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Civil Appeal No W-01(A)-337–06 of 2021) (unreported) (refd)

Legislation referred to

Income Tax Act 1967 ss 33(1), 113(1), (2), Schedule 5, para 34

Appeal from: *Mitraland Kota Damansara Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2022] 9 MLJ 151 (High Court, Kuala Lumpur)

Mohamad Asyraf bin Zakaria (with Ahmad Isyak bin Mohd Hassan) (Senior Revenue Counsel, Inland Revenue Board of Malaysia) for the appellant.
Francis Tan Leh Kiah (with Brandon Shen Shi Han, Vijey M Krishnan and William Wong) (Azman Davidson & Co) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the Director General of Inland Revenue ('DGIR') against the decision of the High Court delivered on 19 May 2021 on a case stated from the Special Commissioners of Income Tax ('SCIT') reversing the decision of the SCIT.

BACKGROUND FACTS

[2] The respondent/taxpayer is a property developer. The appellant/DGIR conducted a field audit and found that the respondent had in its income tax returns for the years of assessment 2014 claimed a deduction on a payment of RM5,518,597 made to the Selangor State Authority ('State Authority') through the Lembaga Perumahan dan Hartanah Selangor ('LPHS') for the release of unsold residential and commercial development units reserved for Bumiputeras ('Bumiputera quota') to be sold to all buyers, including the non-Bumiputeras, in one of its mixed development in Selangor.

[3] Following the audit, the appellant disallowed that deduction as the Inland Revenue Board ('IRB') was of the view that it is not allowable under s 33(1) of the Income Tax Act 1967 ('the ITA'). The appellant then raised a notice of additional assessment for the year of assessment 2014 dated 9 December 2016 ('notice of additional assessment'), and also imposed a penalty under s 113(2) of the ITA on the basis that the respondent had reported an incorrect return form.

[4] The respondent filed an appeal to the Special Commissioners of Income Tax ('SCIT') against the notice of additional assessment.

[5] The agreed issue to be determined by the SCIT were as follows:

(a) whether the sum of RM5,518,597 paid to the State Authority of Selangor for the year of assessment 2014 to procure the approval of the LPHS to sell units of development reserved for Bumiputera buyers to non-Bumiputera buyers are deductible pursuant to s 33(1) of the ITA 1967; and

(b) whether the appellant has correctly and reasonably imposed the penalty of RM344.912.31 under s 113(2) of the ITA in the event the payment to the State Authority is held as non-deductible.

[6] The parties agreed not to call witnesses and only filed their bundles of documents and written submissions. The SCIT, having applied the law to the facts gleaned from the documents and written submissions of the parties, dismissed the respondent's appeal. The SCIT was of the view that the deductions were capital in nature and that they were not expenses that were 'wholly and exclusively incurred ... in the production of gross income' as stipulated in s 33(1) of the ITA.

[7] The SCIT had further determined that the appellant's imposition of penalty under s 113(2) of the ITA was fair, reasonable and in accordance with the law and well within the discretion of the appellant.

[8] Accordingly, the SCIT affirmed the notice of additional assessment where an additional tax of RM1,379,649.25 was raised by the appellant calculated based on the disallowed deduction of RM5,518,597. The amount of penalties imposed on the respondent pursuant to s 113(2) of the ITA for the same year of assessment was RM344,912.31.

[9] The respondent then appealed the decision of the SCIT to the High Court and accordingly the SCIT forwarded a case stated to the High Court pursuant to para 34 Schedule 5 of the ITA for the opinion of the High Court whether on the facts as stated by the SCIT, their decision was correct in law.

THE SCIT'S FINDINGS OF FACTS

In respect of the first issue

[10] There were no dispute of facts between the parties and no statement of agreed facts were filed by the parties before the SCIT. No witnesses were called and the SCIT in making the deciding order had relied on the following findings of fact based on the agreed documents and written submissions filed by the parties. From the agreed documents it was common ground that the State Authority of Selangor had a policy of reserving certain number of units in

any property development in the state to be sold to bumiputera purchasers, and in this regard two administrative circulars were issued by two separate bodies of the State Government, namely:

(a) Pekeliling Pengarah Tanah dan Galian Selangor Bilangan 3/2007 known as 'Penetapan Kuota Bumiputera Dalam Perlaksanaan Pembangunan Tanah Dan Lain-Lain Perkara yang Berkaitan dengan Kuota Bumiputera' ('Pekeliling PTGS Bil 3/2007'); and

(b) Pekeliling Lembaga Perumahan Dan Hartanah Selangor Bilangan 1 Tahun 2011 known as 'Mekanisme Penyelenggaraan Kuota Bumiputera Negeri Selangor' ('Pekeliling LPHS Bil 1/2011').

[11] Pekeliling PTGS Bil 3/2007 applied to all applications for change in category of use of land and issuance of titles, and also contained policy pronouncements on the Bumiputera quota, where a minimum number of units in any development would be reserved for Bumiputera purchasers at a discounted price ('Bumiputera discount'). The Bumiputera discount at the material time was 10% for residential units and 7% for commercial units. This circular further provided that in the event the Bumiputera quota were not sold after being advertised for at least three months, and provided further that all other conditions were fulfilled, the developer may apply to the Majlis Mesyuarat Kerajaan Negeri ('MMKN') for the Bumiputera quota, or any part thereof, be released to non-Bumiputera buyers. Once MMKN gave its approval, the developer may sell these Bumiputera quota units to non-Bumiputera purchasers on condition that a sum equal to the Bumiputera discount be paid to LPHS before the registration of transfer of the property is made. In the event that the developer sells any of the units in the Bumiputera quota to non-Bumiputera buyers before MMKN's approval is obtained, an additional penalty of 5% will be imposed.

[12] The second circular, Pekeliling LPHS Bil 1/2011, referred to the new policy of the MMKN in relation to the release of the Bumiputera quota which was more 'self-regulatory' in nature. The application for released was to be made to the LPHS instead of the MMKN. The SCIT found that the Pekeliling LPHS Bil 1/2011 did not cancel the earlier Pekeliling PTGS Bil 3/2007, and thus ruled that both the circulars were in force and applicable to the present case.

[13] The respondent had applied to the LPHS for the release of the Bumiputera quota in the their mixed residential and commercial development in Kota Damansara. LPHS had approved their application and required the following payments to be made:

(a) for any unsold Bumiputera quota units sold to non-Bumiputera purchasers after the LPHS approval is obtained, the respondent was to

pay LPHS a sum equivalent to the Bumiputera discount (between 7% to 10% sale price depending on the type of unit);

(b) for any Bumiputera quota unit sold to non-Bumiputera purchasers prior to LPHS's approval, the respondent was to pay LPHS a sum equivalent to the Bumiputera discount (between 7% to 10% sale price depending on the type of unit) and pay an additional charge/penalty of 5% of the sale price for breach of the circular; and

(c) these payments are to be made before the registration of the transfer of ownership to the respective purchaser.

[14] The SCIT then went on to make the following findings:

10.30 Dalam Rayuan ini, kelulusan pembangunan asal Pihak Berkuasa Negeri Selangor melibatkan pembinaan dan penjualan unit bangunan yang ditetapkan menjadi kuota Bumiputera dan juga potongan yang diberikan kepada Bumiputera. Kemudiannya Perayu merayu memohon untuk diberikan pelepasan daripada syarat penjualan kepada Bumiputera tersebut dan unit bangunan yang berkenaan boleh dijual kepada bukan Bumiputera.

10.31 Berdasarkan di atas, bayaran pemulangan potongan harga Bumiputera yang dibuat Perayu adalah merupakan satu perbelanjaan modal bagi melepaskan tanggungjawab atau tanggungan Perayu untuk menjual unit pembangunan yang ditetapkan oleh Pihak Berkuasa Negeri dan bagi mendapatkan hak (melalui kelulusan pelepasan yang diberikan) untuk menjualnya kepada bukan Bumiputera. Perbelanjaan tersebut jelaslah bukan satu perbelanjaan yang dibuat 'wholly and exclusively incurred in the production of gross income from that source' di bawah subseksyen 33(1) ACP 1967.

10.32 Selanjutnya kami mendapati Pekeliling PTGS Bil. 3/2007 masih terpakai berkenaan pengenaan penalti atau denda terhadap penjualan kepada bukan Bumiputera sebelum kelulusan diperolehi yang tidak diperuntukkan dalam Pekeliling LPHS Bil 1/2011.

10.33 Sepertimana telah kami putuskan dalam Rayuan terdahulu, Prima Nova Harta Development Sdn Bhd dan Taman Equine (M) Sdn Bhd, pengenaan penalti atau denda yang terdiri daripada jumlah peratusan potongan harga Bumiputera dan denda sebanyak 5% kerana melanggar syarat yang telah dikenakan oleh MMKN Selangor juga bukanlah satu perbelanjaan yang dibuat 'wholly and exclusively incurred in the production of gross income from that source' di bawah subseksyen 33(1) ACP 1967.

10.34 Dalam Rayuan Perayu ini pelanggaran syarat yang dikenakan oleh MMKN ini sepertimana dalam surat LPHS bertarikh 27.5.2013 adalah merujuk kepada penjualan sebelum kelulusan diperolehi yang tidak mengikut mekanisme pelepasan kuota Bumiputera yang diputuskan oleh MMKN Selanor pada 2.3.2011, 3.8.2011 dan 10.8.2011.

10.35 Kami merujuk kepada kes The Commissioner of Inland Revenue v E.C. Warnes & Co. Ltd. (12 TC 227) yang memutuskan yang berikut:

A

> ... penalty was not a loss connected with and arising out of the Taxpayer's trade, hence, not deductible. Penalty or fine is not tax deductible as it is imposed upon a trader personally for a breach of law. Breaking the law cannot be considered to be trading transaction.

B

10.36 Dalam Rayuan ini, penalti atau denda yang dikenakan adalah sivil penalti atau denda yang dikenakan secara sivil atas Perayu yang menjual kuota jualan Bumiputera tanpa memperolehi kelulusan mengikut mekanisme pelepasan kuota Bumiputera yang diputuskan oleh MMKN Selangor pada 2.3.2011, 3.8.2011 dan 10.8.2011.

C

10.37 Perbelanjaan tersebut tidak ada kaitan langsung atau timbul dari perniagaan Perayu, oleh itu tidak boleh menjadi perbelanjaan yang boieh dituntut atau dipotong. Pelanggaran mekanisme pelepasan kuota Bumiputera tersebut bukanlah satu transaksi perniagaan Perayu.

D

10.38 Selanjutnya tindakan Responden tidak membenarkan bayaran tersebut ditolak atau dipotong di bawah subseksyen 33(1) ACP 1967 juga adalah betul kerana menurut perenggan 39(1)(b) ACP 1967 tiada tolakan atau potongan dari pendapatan kasar boleh dibenarkan ke atas apa-apa pembayaran atau perbelanjaan yang dibuat oleh pembayar cukai yang bukan kesemuanya dan semata-mata dibelanjakan bagi menghasilkan pendapatan kasar Perayu. Perenggan 39(1)(b) ACP memperuntukkan:

E

> 39(1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of —

F

> (b) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of producing the gross income;

G

10.39 Dalam keputusan kami ini, bagi menerangkan lagi perkataan 'in the production of gross income from that source' kami juga telah merujuk kepada kes *Ampat Tin Dredging Ltd. V. Director General of Inland Revenue* [1982] CLJ Rep 402 dan kes *Piramid Intan Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2015] 10 MLJ 436.

H

10.40 Oleh itu bagi isu pertama, kami memutuskan wang sebanyak RM5,518,597.00 yang dibayar kepada Pihak Berkuasa Negeri Selangor dalam Tahun Taksiran 2014 untuk mendapatkan kelulusan Pihak Berkuasa Negeri untuk menjual unit pembangunan yang direzabkan untuk Bumiputera kepada bukan Bumiputera merupakan perbelanjaan yang tidak boleh dipotong di bawah subseksyen 33(1) ACP 1967.

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10.41 Kami juga berpandangan bahawa Perayu telah pun memperoieh inbuhan atau pulangan apabila diberikan pelepasan kuota jualan Bumiputera dan setelah membuat bayaran penalti atau denda tersebut. Perayu telah pun memperoieh balasan yang menjadi tujuan bayaran penalti atau denda dibuat iatu Perayu boleh menjual dan memindahmilikkan bangunan yang sebelum kelulusan diberikan hanya boleh dijual kepada Bumiputera pada harga potongan kepada bukan Bumiputera pada harga penuh tanpa potongan.

10.42 Kami juga berpandangan sekiranya kami membenarkan perbelanjaan yang dibuat Perayu dituntut dan dipotong di bawah subseksyen 33(1) ACP 1967, Perayu akan memperoieh keuntungan berlipat kali ganda sekurang-kurangnya 2 kali ganda. Pertamanya, melalui penjualan kepada bukan Bumiputera pada harga penuh tanpa potongan, Perayu telah pun memperolehi kembali bayaran penalti atau denda yang dibuat kepada LPHS. Keduanya, Perayu akan memperolehi keuntungan sekali lagi melalui pengurangan pendapatan yang boleh dikenakan cukai setelah ditolak perbelanjaan tersebut.

10.43 Kami berpandangan dari segi kepentingan awam juga, Perayu tidak sepatutnya dibenarkan membuat tuntuan perbelanjaan sedemikian. Sekiranya dibenarkan, ia akan menggalakkan pemaju perumahan mencari jalan untuk untuk mengeiakkan unit pembangunan menjadi kuota Bumiputera dijual kepada Bumiputera dan membiarkan Kerajaan bersendirian menangani masalah ketidakseimbangan kapasiti kaum di sesebuah Kawasan yang hanya didominasi oleh kaum-kaum tertentu.

In respect of the second issue

[15] In respect of the second issue on the imposition of penalty under s 113(2) of the ITA, the SCIT made the following findings:

10.45 Berkenaan isu kedua, kami mengambil maklum tentang keputusan kes terdahulu yang telah diputuskan oleh mahkamah ini atau mahkamah sivil lain mengenai kuasa budi bicara Responden mengenakan penalti sepertimana yang dihujahkan oleh Responden.

10.46 Dalam Rayuan ini, semua perbelanjaan sebanyak RM5,518,597.00 yang tidak dibenarkan dituntut dan dipotong di bawah ACP 1967 yang telah dituntut dan dipotong Perayu melibatkan satu jumlah yang besar dan ditemui hanya setelah audit dijalankan oleh Responden.

10.47 Sekiranya tiada audit dijalankan dan tuntutan dibenarkan, negara ini akan kehilangan cukai dalam jumlah yang besar yang sepatutnya boleh dipungut untuk digunakan dan disalurkan bagi kemakmuran dan kemaslahatan negara dan rakyat khususnya dan ini termasuk kita semua, kedua-dua ibubapa kita, anak-anak kita, saudara-mara kita dan seterusnya dan sebagainya. Perayu sepatutnya lebih peka dengan tanggungjawab Perayu sebagai pembayar cukai.

10.48 Kita semua patut bersyukur dan berterima kasih kepada Responden kerana hasil dari audit yang telah dijalankan oleh pegawai Responden, perbelanjaan yang tidak dibenarkan dituntut dan dipotong tersebut telah pun dapat ditemui. Tindakan murni Responden ini dapat mengembalikan hasil cukai kepada negara.

10.49 Oleh itu kami memutuskan bagi isu kedua bahawa Responden telah dengan secara betul dan manasabahnya mengenakan penalti di bawah subseksyen 113(2) bagi Tahun Taksiran 2014. Pengenaan penalti tersebut boleh dijadikan tauladan kepada Perayu dan pembayar cukai lain supaya tidak mengulangi dan membuat perkara yang sama.

[16] Hence, the SCIT resolved both issues in favour of the DGIR. The SCIT was of the view that the amount equivalent to the Bumiputera discount and the additional 5% payment for selling the Bumiputera quota units prior to obtaining the approval of the LPHS were not expenditure wholly and exclusively incurred in the production of income pursuant to s 33(1) of the ITA, and that these payments were capital in nature. Further, the SCIT was of the view that the imposition of penalty under s 113(2) of the ITA was reasonable and well within the discretion of the DGIR. The SCIT then dismissed the respondent's appeal and affirmed the notice of additional assessment raised by the DGIR.

HIGH COURT'S FINDINGS AND DECISION

[17] The learned High Court judge found that the SCIT had erred in law in affirming the decision of the DGIR and dismissing the respondent's appeal. The learned judge set aside the SCIT's decision and stated as follows in her grounds of judgment:

> [22] It is of the considered view that the SCIT's finding is flawed. On the one hand, the SCIT stated that the appellant had violated the condition imposed by the State Government. However, the SCIT had also admitted that approval was in fact given to the appellant to release the Bumiputera units to be sold to the non-Bumiputera. So, the payments of 7% (commercial units) and 10% (residential units) to the State Government are payments made for approval to sell the Bumiputera units to the non-Bumiputera. The payments cannot be said to be a fine or penalty because there is in fact no issue of the appellant violating the condition imposed after all.
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> [23] The respondent argued that the payment was made to obtain permission for the appellant's production of income and that the payment was made to comply with conditions imposed by the State Government who will allocate certain percentage in order to enable the appellant to effectively generate income. It is contended that the payment was not made wholly or exclusively in the production of income but just 'necessarily' for the production of income.
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> [24] It is of the considered view that the respondent's argument is misconceived. The agreed fact is that without making the payment the Bumiputera units cannot be transferred or released to the non-Bumiputera. It cannot be disputed that without the payments being made, the appellant would not have been able to sell the Bumiputera units to the non-Bumiputera purchasers and generate its income. By selling the Bumiputera lots to non-Bumiputera it directly generates the appellant's income as a property developer. Once the appellant's business has commenced there can never be a distinction before what is incurred for or in the production of income. The appellant needs to return the Bumiputera discount to the State Government. The character of the payment is unequivocal.
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> [25] The payment was in fact made in the course of operating the appellant's business. The expenses or payments incurred by the appellant are not just 'wholly and exclusively' borne for the purpose of generating income, it is also closely related, incidental and relevant to the appellant's business. Thus, such expenses/payment

should be made deductible under s 33(1) ITA.

[28] The appellant, being unable to sell the Bumiputera units, opted to obtain the release of the units to sell to non-Bumiputera purchasers. It is clearly necessary and integral for the appellant to do so and it cannot be disputed that the payment flowed from the act forming the essence of the appellant's business and done for the purpose to earn revenue. The payment is therefore unavoidable for otherwise the appellant will not be able to generate its income. So it is obvious that the appellant's purpose or object behind the payment is to procure a benefit, which is purely a business one.

[29] Further, it is of the considered view that the payment is not of capital in nature since the appellant has all along, the right to sell. The payment was made so as to enable the appellant to widen its group or class of people it can sell to. The payment was therefore business normal payment in order to produce income.

In short, the High Court found that the payments to the LPHS were not capital in nature but rather expenses incurred by the respondent to generate income, and thus deductible under s 33(1) of the ITA in computing the taxable income.

THIS COURT'S ANALYSIS AND FINDINGS

The appellant's contention

[18] The appellant, in the main, contended that the learned High Court judge was wrong to set aside the SCIT's decision as there was no error of law or findings of facts made by the SCIT. In summary, the appellant contended that the learned High Court judge had erred in her decision for the following reasons, namely that:

(a) the facts found by the SCIT are unassailable;

(b) the LHCJ failed to recognise the crucial facts proven before the SCIT that based on the LPHS letters dated 27 May 2013, 21 November 2013, 27 June 2014 and 26 August 2014 that the respondent had to pay LPHS between 7%–10% of the purchase price as payment to release the Bumiputera quota units and a 5% penalty for violating the original terms prohibiting the sale of bumiputera reserved units to non-Bumiputera purchasers;

(c) the nature of the respondent's aforesaid 7%, 10% and 5% payment to LPHS is penalty or pecuniary punishment imposed on the respondent for selling the bumiputera reserved units to non-Bumiputeras in violation of the State Authority's policy on division of the development units between bumiputera and non-Bumiputera purchasers;

(d) the penalty payment is not an allowable expense and is not deductible under s 33(1) of the ITA as this payment cannot be construed as payment 'wholly and exclusively incurred in the production of gross income' of the respondent. Thus, the HCJ erred in concluding that the payment of penalty or fine to the LPHS is deductible under s 33(1) of the ITA;

(e) the respondent failed to adduce evidence that the payment to LPHS is not penal in nature before the SCIT. And even if it is not penal in nature, that payment is also not allowable under s 33(1) of the ITA as the element of consideration/benefit exist in the form of release of the bumiputera reserved units. Thus, the payment to LPHS can be regarded as capital expenditure;

(f) Pekeliling LPHS Bil 1/2011 is applicable, thus making the payment to the State Authority non-deductible; and

(g) the respondent did not call any witness from LPHS to verify the respective circulars.

Previous judicial decisions

[19] Learned senior revenue counsel appearing for the appellant also submitted that the issues in the present appeal are similar to that in the cases of *Ketua Pengarah Hasil Dalam Negeri v Prima Nova Development Sdn Bhd* (Civil Appeal No W-01(A)-318–07 of 2020) (unreported) and *Taman Equine (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Civil Appeal No W-01(A)-337–06 of 2021) (unreported) and that this court had resolved the issues in both cases in favour of the appellant. Hence, learned counsel for appellant is urging this court to follow the decisions in those two cases.

[20] However, we do not have the benefit of the grounds of judgment for both these cases, and in the premise it cannot be gainsaid that the doctrine of stare decisis applies to bind us to these earlier decisions. Though the applicable general principles are the same, each tax case would have to be decided on its peculiar contextual facts and circumstances as was stated by Raja Azlan Shah FCJ (as HRH then was) in *I Investment Ltd v Comptroller-General of Inland Revenue* [1975] 2 MLJ 208:

> I think it right to emphasise what has already been treated judicially that cases on income tax depend so much on their peculiar facts that excessive reliance on precedents may be dangerous.

[21] Therefore, each case must be resolved by careful consideration of the facts of the case and the nature of the particular trade being carried out by the taxpayer.

ISSUES RAISED BY THE DGIR BEFORE THIS COURT

[22] Though the learned senior revenue counsel had listed a number of grounds for the appeal, the issues may be summarised as follows:

(a) whether the findings of the SCIT are unassailable?

(b) whether the payments to LPHS are deductible under s 33(1) of the ITA? and

(c) whether the imposition of penalty under s 113(1) is warranted?

First issue — Whether the findings of the SCIT are unassailable?

[23] The law is well settled in that the findings of fact made by the SCIT are generally unassailable. However, there are exceptions to this general rule. The courts can and will embark on curial intervention in some limited circumstances. Paragraph 34 of Schedule 5 of the ITA clearly stipulates that an appeal from the SCIT against a deciding order may be made to the High Court only on a question of law. So what then amounts to a question of law for the purposes of para 34 of Schedule 5 of the ITA? This was answered concisely by the Federal Court in *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248; [1984] 1 CLJ Rep 108 as follows:

> Appeals from the decisions of the Special Commissioners in tax cases are made by way of case stated under the Income Tax Act 1967 Schedule 5, para 34. *The paragraph states clearly that any appeal is on a question of law. Hence, pure findings of fact may not be challenged on an appeal. However, the court has clear and undoubted jurisdiction to reverse a decision on question of law. The term 'question of law' includes the correctness of (a) pure statement of law (eg as to the correct interpretation of a statutory provision), and (b) the inferring of a conclusion from the primary facts (where the process of inference involves assumptions as to the legal effect or consequences of the primary facts).*
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> In *Chu Lip Kong*'s case the Privy Council reversed the Commissioners' decision on the ground that it was wrong in law. The approach is similar to that of the House of Lords in *Edwards v Bairstow & Harrison* [1956] AC 14; [1955] 3 All ER 48; [1953] 36 TC 207, a case universally acknowledged as the leading authority on the distinction between questions of fact and questions of law. It was also referred to by the learned judge. He was fully conscious of the critical distinction between questions of fact and law. He stated the position succinctly and accurately before citing a passage from the above case. At p 54 of the appeal record he reminded himself in the following words: ...
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> > *The power of the court to interfere is quite limited where the findings of the Special Commissioners are basically findings of facts. The court will interfere only if there is no evidence to justify the finding or where they have applied erroneous tests in arriving at their conclusions or have drawn a wrong inference on the facts or have misdirected themselves in law ...*

[24] This principle was reiterated by the then Supreme Court in *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 BLJ 265 where Edgar Joseph Jr SCJ speaking for the court had this to say on the role and appellate function of the High Court in taxation appeals:

> First of all, it would be pertinent to say that in considering this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v Bairstow and Harrison*, regarding the duty of the court when hearing appeals from Commissioners in tax cases. It will be recalled that in that case what Lord Radcliffe said (at pp 35–36) was this:
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> > I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, *it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.* In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.
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> In *Chua Lip Kong v Director-General of Inland Revenue,* Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms: ... it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable Special Commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in *Edwards v Boirstow*. It is a conclusion or decision of the Special Commissioners which the High Court was entitled to and ought to have set aside.
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> And, in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue*, when

delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the Special Commissioners. Here is what His Lordship said (at p 169):

> The Special Commissioners are, of course, as the Federal Court rightly observed, the judges of fact but in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In their Lordships' judgment, the Special Commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.

In *Commissioners of Inland Revenue v Fraser*, Lord President Normand said this (at p 501):

> Then the commissioners, on consideration of the facts and arguments submitted to them, decided by a majority that an adventure in the nature of trade had not been carried on; that an investment had been made and subsequently realised, and that the profit was not assessable to income tax. It is obvious from the way in which the commissioners have stated their conclusion that they were quite aware that they were not stating something in the nature of a primary fact but were stating a conclusion into which argument upon the construction of the Income Tax Act had entered. *The respondent's counsel maintained, however, that that finding was a finding in fact and, as such, was not reviewable by this court. I think we have jurisdiction to entertain the question at law, which is whether the majority of the commissioners were warranted on the evidence in determining as they did. At the narrowest it is always open to this court in a stated case to review a finding in fact on the ground that there is no evidence to support it*. That has been stated again and again.

[25] Hence, the phrase 'question of law' in para 34 of Schedule 5 of the ITA, encompasses two aspects of the SCIT's decision, namely where the appellant questions that decision of the SCIT:

(a) firstly, on the accuracy of a purely legal proposition or statement of law (such as determining the proper interpretation of a statutory provision), or misdirected; or misdirection on the law; or answered the wrong question of law; or failed to answer a question of which they ought to have answered;

(b) secondly, on the inferences drawn or a conclusion deduced from the primary facts (which involves presumptions about the legal impact or repercussions of those facts), which includes:

(i) consideration of whether there is sufficient evidence to support the SCIT's inferences drawn from the primary facts, or took into account factors that they ought not to have;

(ii) the question of whether the SCIT's determination was warranted on the

available evidence; or reached a conclusion that is not supported by the available evidence; and

(iii) a conclusion that no reasonable Special Commissioners in the circumstances would have reached if they had correctly directed themselves in law.

[26] Thus, in any of the above circumstances the court is vested with jurisdiction under para 34 of Schedule 5, of the ITA, to intervene. It is also essential to highlight that the SCIT had a responsibility to carefully consider all relevant facts and evidence, both for and against the taxpayer. Failure to do so or overlooking critical facts would constitute a misdirection in law, and in such cases, the High Court would need to intervene. According to Sharma J in *Nyf Realty Sdn Bhd v Comptroller of Inland Revenue* [1974] 1 MLJ 182; [1985] 1 MTC 234; [1974] 1 LNS 100, the High Court may set aside the decision of the SCIT on that basis, depending on the circumstances.

[27] In the present appeal, at the High Court the respondent had contended that the conclusion reached by the SCIT that the payments of 7% (commercial units) and 10% (residential units) of the sale price of the respective development units to the State Government are a fine or penalty is wrong in law as the facts do not support that conclusion. In this regard, the respondent further contended that contrary to the findings of the SCIT, these payments were in fact made wholly or exclusively in the production of income and that they are not capital in nature. We are of the view that these matters are open to appellate review under para 34 of Schedule 5, of the ITA. Hence, we do not agree that with submissions of the learned senior revenue counsel that the findings of the SCIT in this case are unassailable. The courts can review the conclusions reached by the SCIT to ascertain if indeed these conclusions are borne out by the facts and evidence in that case.

Second issue — Whether the payments to LPHS are deductible under s 33(1) of the ITA?

[28] The SCIT was of the view that the nature of the respondent's aforesaid payment to LPHS is penalty or pecuniary punishment imposed on the respondent for selling the bumiputera reserved units to non-Bumiputeras in violation of the State Authority's policy on division of the development units between bumiputera and non-Bumiputera purchasers; and hence not deductible under s 33(1) of the ITA. However, the High Court reversed that decision on grounds that it was flawed in law.

[29] The learned High Court judge found that the SCIT had erred in law in affirming the decision of DGIR and dismissing the respondent's appeal. The learned judge set aside the SCIT's decision and stated as follows in her grounds

of judgment:

> [22] It is of the considered view that the SCIT's finding is flawed. On the one hand, the SCIT stated that the appellant had violated the condition imposed by the State Government. However, the SCIT had also admitted that approval was in fact given to the appellant to release the Bumiputera units to be sold to the non-Bumiputera. So, the payments of 7% (commercial units) and 10% (residential units) to the State Government are payments made for approval to sell the Bumiputera units to the non-Bumiputera. The payments cannot be said to be a fine or penalty because there is in fact no issue of the appellant violating the condition imposed after all.

[30] We agree with the learned judge. The policy of the State Government, as can be gleaned from the two circulars, is that a certain portion of the development units, be it industrial, commercial or residential, are reserved for the bumiputera community. The policy is also for the developer to give a discount to these bumiputera purchasers. The discount, for the purposes of this case, is 7% for commercial and 10% for residential units from the sale price. Hence, if the normal price of a residential unit is RM500,000 the discount would be 10% of that, which amounts to RM50,000. Thus, the discounted 'bumiputera price' is RM450,000. So the after discount income to the developer from the sale of such a bumiputera residential unit is RM4500, even though the sale price is RM500,000, Whilst it would be RM500,000 from the sale of an equivalent residential unit to a non-Bumiputera buyer.

[31] The policy also provides that if the bumiputera units could not be sold after a specified period of time and effort having been made for their marketing and sales, the developer could apply to the LPHS to lift the restriction and sell the reserved bumiputera units to non-Bumiputera purchasers. In the event the approval is granted, then an amount equivalent to the Bumiputera discount of 7% or 10%, as the case may be, has to be paid or refunded to LPHS for each such sale of a bumiputera unit to a non-Bumiputera. Hence, on a sale of a residential unit priced at RM500,000, the developer would have to pay the sum of RM500 to LPHS (equivalent to 10% Bumiputera discount). Thus, the income from such sale would be RM450,000, which is the same as the after discount income from the sale of a similar unit to a bumiputera purchaser. Thus, contrary to the findings of the SCIT, there is no gain in terms of the net realised sales proceeds to the respondent from the sale of the bumiputera units to non-Bumiputera purchasers after the LPHS approval is obtained. Thus we find that the following findings of the SCIT are plainly wrong:

> 10.42 Kami juga berpandangan sekiranya kami membenarkan perbelanjaan yang dibuat Perayu dituntut dan dipotong di bawah subseksyen 33(1) ACP 1967, Perayu akan memperoleh keuntungan berlipat kali ganda sekurang-kurangnya 2 kali ganda. Pertamanya, melalui penjualan kepada bukan Bumiputera pada harga penuh tanpa potongan, Perayu telah pun memperolehi kembali bayaran penalti atau denda yang dibuat kepada LPHS. Keduanya, Perayu akan memperolehi

keuntungan sekali lagi melalui pengurangan pendapatan yang boleh dikenakan cukai setelah ditolak perbelanjaan tersebut.

The respondent will not make any additional profit through the sale of the these bumiputera units to non-Bumiputera purchasers as the respondent has to pay/refund the amount equivalent to the Bumiputera discount to LPHS. The SCIT's finding is untenable. The respondent will not make further profit through the reduction of taxable income after deducting these expenses as the respondent declares the full non-Bumiputera purchase price stated in the invoice or the sale and purchase agreement as the turnover, and not the discounted bumiputera purchase price. As such, by deducting the 10% Bumiputera discount paid/refunded to LPHS as a revenue expense the respondent is merely reducing its taxable income to reflect its true income from that sale.

[32] The respondent, as permitted under the two circulars, had applied to LPHS for the release and sale of some of the unsold bumiputera units to non-Bumiputera purchasers. However, before the LPHS approval was granted, and in anticipation that such approval would be granted as it would be a matter of course when the conditions for the release are fulfilled, the respondent had sold some of these bumiputera units to non-Bumiputera purchasers. The circulars stipulate that if any bumiputera units are sold prior to the approval being granted by LPHS, then on top of the payment of the sum equivalent to the Bumiputera discount, the developer would have to pay an additional penalty of 5% of the sale price. Hence, if a residential unit with a normal price of RM500,000 reserved for the bumiputera is sold to a non-Bumiputera before LPHS's approval is obtained, then over and above the equivalent of the Bumiputera discount of RM50,000 (10%), the developer would have to pay an additional RM250 (5%) to LPHS. This additional payment is termed a charge or in the Bahasa Melayu circular stated as 'caj pelanggaran mekanisme pelepasan Bumiputera' as it is imposed by the State Authority as a penalty for infringement or breach of the terms of the circulars.

[33] In this case, the total amount of refund of Bumiputera discount paid by the respondent to LPHS for the bumiputera units released and sold to the non-Bumiputera purchasers was RM4,468,090 (the 10% Bumiputera discount) and the additional amount of penalty paid for breaching the circular was RM 1,050,497 (the 5% penalty), thus making a total of RM5,518,597, which the respondent had claimed as deductible expenses under s 33(1) of the ITA and which forms the subject of the additional notice of assessment.

[34] We are of the view that the payment or refund of the sum of RM4,468,090 to the LPHS, which is equivalent to the Bumiputera discount, is a revenue expense that is deductible under s 33(1) of the ITA. As illustrated

above, the net sales income to the developer when a bumiputera unit is sold to a bumiputera purchaser or to a non-Bumiputera purchaser after LPHS approval is the same. There is no additional gain to respondent, and contrary to the SCIT's finding, the respondent in this case has not profited by selling any bumiputera unit to a non-Bumiputera purchaser.

[35] The effect of the payment of the sum equivalent to the Bumiputera discount to the LPHS was to achieve sales. The payment is exclusively related to business operations, in order to generate income. In fact it is common ground that without making the payment to LPHS the bumiputera units cannot be transferred or released to the non-Bumiputera purchasers. And it cannot be disputed that without the payments being made, the respondent would not have been able to sell the bumiputera units to the non-Bumiputera purchasers and generate its income. By selling the bumiputera lots to non-Bumiputera purchasers it directly generates the respondent's income as a property developer.

[36] In this regard we find the following findings by the SCIT to be entirely misconceived:

> 10.43 Kami berpandangan dari segi kepentingan awam juga, Perayu tidak sepatutnya dibenarkan membuat tuntuan perbelanjaan sedemikian. Sekiranya dibenarkan, ia akan menggalakkan pemaju perumahan mencari jalan untuk untuk mengelakkan unit pembangunan menjadi kuota Bumiputera dijual kepada Bumiputera dan membiarkan Kerajaan bersendirian menangani masalah ketidakseimbangan kapasiti kaum di sesebuah kawasan yang hanya didominasi oleh kaum-kaum tertentu.

The SCIT was of the view that allowing the payment of the equivalent of the Bumiputera discount to LPHS to be tax deductible under s 33(1) of the ITA would encourage property developers to not sell the Bumiputera quota units. There is no basis for the SCIT to come to such a conclusion. In fact, the contrary is borne out by the terms of two circulars, which clearly provides for an application to be made for the release of any unsold bumiputera reserved units to be sold to non-Bumiputera after lapse of certain specified time period and provided all other stipulations in the circulars were met.

[37] Why was there an option given to developers to seek the release of the bumiputera units? The simple answer is that the units that the property developers build and complete are their stock-in-trade. Property developers receive income from the sale of these units. If the units cannot be sold, there is no income. The option was provided by the Selangor State Government so that property developers can unlock and sell these units that could otherwise be not sold to the general public. The effect of the payment to LPHS was to achieve sales. The payment is exclusively related to business operations, in order to

generate income. If not, there would be no income from these bumiputera units. This would be a classic revenue expense, and is quite the opposite from being a capital expense as contended by the appellant, as the payment is directly related to the respondent's stock-in-trade. The payment to the LPHS recurs every time that a bumiputera unit is sold to a non-Bumiputera purchaser and that is a clear indication that the expenditure is revenue, as opposed to capital in nature. These payments are incurred wholly and exclusively in the production of income. These payments do not bring about enrichment of or the improvement to an item of fixed capital for them to be construed as capital expenditure.

[38] In *Ampat Tin Dredging Ltd v Director General of Inland Revenue* [1982] 2 MLJ 46, the court held that the issue of whether an outgoing or expense is wholly and exclusively incurred in the production of gross income and therefore deductible in the calculation of adjusted income is a question of fact to be decided on the circumstance of each case. We agree with learned counsel for the respondent that in the present case the 10% payments made to LPHS were made to secure sales thereby earning income. In fact the LPHS Circular Bil No 1 provides:

> 6.1 Pemaju yang diberikan pelepasan kuota Bumiputera akan dikenakan syarat pemulangan potongan harga Bumiputera kepada LPHS sebelum proses pindahmilik dibuat.

Hence, it is only after the respondent had shown to the satisfaction of LPHS that there were no potential bumiputera buyers for the reserved units would the respondent be able to apply to release the Bumiputera quota, and that too upon payment/refund of the Bumiputera discount (*pemulangan potongan harga Bumiputera*) to LPHS.

[39] It must be noted that the respondent had the right to sell these bumiputera units all along, as they were the respondent's stock-in-trade. The payment to LPHS merely widens the group or class of people to whom these units can be sold. There is no asset or enduring benefit that has been acquired by virtue of the payment. Case authorities have recognised that a payment made to remove an obstacle to profitable trading is attributable to revenue. See: *Director General of Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214.

[40] Now, as for the additional 5% penalty or charge, we agree with the learned senior revenue counsel that this payment is not deductible under s 33(1) of the ITA. The circulars prohibit the sale of the bumiputera units to non-Bumiputeras without approval of the LPHS, and if a developer breaches this prohibition, then a penalty of 5% is imposed on top of the payment of the equivalent of the Bumiputera discount to LPHS. This payment is avoidable.

The respondent could have sold these units after the LPHS approval is obtained, which would be a matter of course if they have fulfilled all the stipulations in the circulars for their release for sale to the general public. Hence, it cannot be said to be 'expenses wholly and exclusively incurred ... in the production of gross income from that source ....

[41] This payment of 5% penalty is analogous to say a taxpayer whilst transporting his goods (stock-in-trade) on his lorry to effect sales received a traffic summons for speeding, and had to pay a fine of RM300 which he seeks to deduct as a revenue expense in his tax returns. Now, though that is an expense that he incurred whilst carrying out his trade it is not deductible. Whilst expenses such as fuel, road tax, motor insurance, toll charges for the lorry are deductible under s 33(1) of the ITA as they are 'expenses wholly and exclusively incurred ... in the production of gross income from that source the fine or penalty paid on the traffic summons is not, even if the reason for speeding on the highway was to reach his destination on time to effect the sale which he otherwise would miss. Similarly, the 5% penalty paid to hasten the transaction and achieve an earlier sale before the LPHS approval is obtained cannot be construed as 'expenses wholly and exclusively incurred ... in the production of gross income from that source ...' for the purposes of s 33(1) of the ITA.

[42] The law is very clear on this, and it is well established that a penalty imposed upon the taxpayer for an infraction of the law is not deductible expense as it is not incurred in the production of gross income. See: *CIR v EC Warnes & Co Ltd* [1919] 12 TC 227 where it was held that:

> Penalty or fine is not tax deductible as it is imposed upon a trader personally for a breach of law. Breaking the law cannot be considered to be trading transaction.

[43] The business of the respondent could very well be carried on without the infraction of the policy requirements of the State Government as contained in the two circulars. Hence, we would set aside the High Court's decision as regards the sum of RM1,050,497 (5%) penalty imposed by the LPHS for the breach of the circular.

[44] The DGIR and the SCIT had disallowed both the sum of RM4,468,090 and the sum of RM1,050,497 as being deductible under s 33(1) of the ITA. And the High Court had reversed that decision in total and ruled that the entire sum (RM4,468,090 + RM1,050,497) totaling RM5,518,597 is deductible. However, we are of the considered view that the DGIR and SCIT are partly correct in their decision in that the sum of RM1,050,497 paid as penalty is not deductible under s 33(1) of the ITA.

[45] To that extent, with respect, we find that the High Court had erred. Hence, we hold that the sum of RM1,050,497 is not deductible under s 33(1) of the ITA. Therefore, the appellant's appeal on the payment of penalty amounting to RM1,050,497 is allowed and the DGIR may proceed to raise a notice of additional assessment for the Year of Assessment 2014 for that amount. Thus, the order of the High Court is varied to that extent.

Third issue — Whether the imposition of penalty under s 113(1) is warranted?

[46] As for the imposition of penalty under s 113(2) of the ITA, the SCIT found that the appellant had properly and reasonably imposed a penalty. We agree with the submissions of learned counsel for the respondent that the present case is one where there is a genuine difference of opinion between the IRB and the taxpayer on the interpretation of a particular provision of the ITA. In that regard, we concur with the learned High Court judge that s 113(1) and (2) of the ITA do not apply to situations where there is a genuine difference of opinion on the interpretation of the law.

[47] We find that the respondent has taken a reasonable and considered legal position in submitting its returns and took the view that all payments to the LPHS were deductible under s 33(1) of the ITA. The facts disclose that the respondent had acted in good faith and had made full disclosure. Hence, we concur with the High Court on its findings as regards the penalty imposed under s 113(2) of the ITA in the sum of RM344,912.31, and affirm the High Court's ruling to set aside the said penalty.

OUR DECISION/ORDER

[48] In the premise of the above, we make the following orders:

(a) that the appeal is allowed in part as stated above; and

(b) the notice of additional assessment for the Year of Assessment 2014 dated 9 December 2016 be amended to give effect to this decision; and

(c) parties to bear their own costs.

Appeal allowed in part.

Reported by Ashok Kumar